



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 18, 1996

Ms. Esther L. Hajdar
Assistant General Counsel
Texas Department of Agriculture
P.O. Box 12847
Austin, Texas 78711

OR96-0344

Dear Ms. Hajdar:

The Texas Department of Agriculture (the "department") has asked whether certain information is subject to required public disclosure chapter 552 of the Government Code. That request was assigned ID# 28248.

The department received a request for "access to all records in the files of [the department's] District Office in the Rio Grande Valley that are open records and in any way relate[d]" to complaints, investigations, and enforcement activities concerning the use or purchase of pesticides or violations of the Agricultural Hazard Communication Act, chapter 125 of the Agriculture Code. The requestor stated that he was seeking information from both closed files and ongoing investigations and complaints. The department contends that information related to ongoing investigations is excepted from disclosure under section 552.103(a).

We note that the requestor stated that he was not seeking confidential information such as medical records that are made confidential under section 5.08 of the Medical Practice Act, article 4495b, V.T.C.S. See Open Records Decision No. 578 (1990). The requestor also indicated that he was not seeking information related to matters currently pending in litigation. Since the department has not contended that the non-confidential material in closed files is excepted from disclosure, we assume the requestor has been provided those requested records. Thus, as it is our understanding that the only records at issue are those concerning ongoing investigations, we do not address records in closed investigations.

To show the applicability of section 552.103(a), a governmental entity must show that the information at issue is related to pending or reasonably anticipated litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4; see also Attorney General

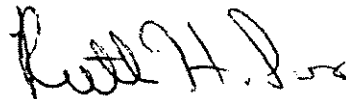
Opinion MW-575 (1982). For purposes of section 552.103(a), this office considers a contested case under the Administrative Procedures Act (the "APA"), Government Code chapter 2001, to constitute litigation. Open Records Decision No. 588 (1991) at 7 (construing statutory predecessor to the APA). The department's rules provide that contested hearings are subject to the APA. 4 T.A.C. §§ 1.2, .3. We agree that you have demonstrated that litigation is reasonably anticipated in these cases that are currently under investigation.

You submitted to this office for our review "representative samples" of the records at issue. We assume that this sample is truly representative of the requested records as a whole, *see* Open Records Decision No. 499 (1988), 497 (1988), and thus we do not address any other requested records to the extent that those records contain substantially different types of records than that submitted to this office. Our review of the documents at issue indicates that they are related to the anticipated litigation in the cases under investigation.

Please note, however, that once the opposing parties in the anticipated litigation have seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a). The applicability of section 552.103(a) also ends once the litigation has been concluded. Attorney General Opinion MW-575; Open Records Decision No. 350 (1982) at 3. Also, since the section 552.103(a) exception is discretionary with the governmental entity asserting the exception, it is within the department's discretion to release this information to the requestor. Gov't Code § 552.007; Open Records Decision No. 542 (1990) at 4.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/ch

Ref: ID# 28248

Enclosures: Submitted documents

cc: Mr. Richard Lowerre
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(w/o enclosures)